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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

against

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Chicago, Illinois, August 1st, 1940.

THE DUNTHORP-WARREN PRINTING COMPANY, 520 WEST JACKSON, CHICAGO

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FOREWORD.

This brief is in reality two briefs. While the petition is not dependent upon the interpretation which this court shall place upon the complaint, the legal questions arising, and the error of the court below differ, depending upon how the complaint is interpreted.

For example: the Circuit Court finds that the complaint alleges a violation of Section 6 of the Commerce Act, thereby establishing its sole ground for Commission jurisdiction. We deny that any such allegation appears in the complaint, and reason that therefore there can be no jurisdiction in the Commission. This point is fully argued.

Next, we assume that this court will also find that the complaint alleges a violation of Section 6 of the Act. On that premise, we submit that no administrative question need be considered in deciding whether that violation exists or not. This portion of the brief is entirely moot and unnecessary, *if* the court adopts our interpretation of our complaint.

Likewise, the court finds that a contractual relationship existed between plaintiff and the public stock yards. We assert the complaint establishes no contractual relation whatever between those parties, and argue that question fully. Then, we must assume that the Circuit Court's interpretation will be found correct, and brief the error committed by the Circuit Court on that assumption. And again, our brief on this point is of a question wholly moot, if this court adopts our interpretation of our complaint.

We point out this constant alternative, as the basis for our apology for the unusual length of this brief.

The Statutes Involved.

The following statutes are involved (the applicable portions of which are fully set forth in Appendix A hereto):

Section 22 of Title 49, U. S. Code Annotated, wherein certain jurisdiction of the State and Federal Courts are reserved. (Set forth at page 47, *post.*)

Section 9 of Title 49, U. S. Code Annotated, wherein certain alternative jurisdiction between the Federal Courts and the Commerce Commission is created. (Set forth at page 47, *post.*)

Sections 12, 13(1); 15(1); and 16(1) of Title 49 U. S. Code Annotated, wherein the jurisdiction of the Commerce Commission is limited to actions grounded upon a violation of the Commerce Act, by a common carrier subject thereto. (Set forth at pages 44-47, *post.*)

Section 148, Chapter 110 Smith Hurd's Ill. Statutes Annotated, permitting the joinder of similar causes of action, and of different defendants, in ac-

tions wherein similar causes of action are involved. (Set forth at page 48, *post.*)

Opinions of the Courts Below, and Dates Thereof.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on May 31, 1939. It is reported in 27 Fed. Supp. 625, and appears at pages 46-55 of the transcript of record herein.

On appeal therefrom, the first opinion of the United States Circuit Court of Appeals for the Seventh Circuit was filed April 4, 1940. The opinion on petition for rehearing was filed May 21, 1940. Both opinions are reported in 111 Fed. (2d) 913, and are found on pages 77-86, and 91-92 of the transcript of record herein.

Grounds for Jurisdiction.

The grounds for the jurisdiction are fully stated at page 7 of the accompanying petition.

STATEMENT OF THE CASE.

Since one of the grounds for review on certiorari is the refusal of the Circuit Court, in considering a motion to dismiss, to accept the facts alleged in the complaint as admitted and true, a summary of the allegations of the complaint, with record references, appears at pages 2-5, of the petition. Briefly, the case involves the jurisdiction of the courts, and the duties and liabilities of a common carrier of livestock, in interstate commerce, under the following admitted facts.

Plaintiff made shipments of livestock on bill of lading contracts with Defendant carriers. The shipments were consigned to a station named in Defendants' tariffs as "Union Stock Yards, Illinois". At this station (but *not* comprising it) there was a public stock yard frequently used by Defendants as a delivering station for livestock shipments. There were other points at the same station at which livestock could have been delivered.

Plaintiff made no selection of any particular point at this station at which its shipments were to be delivered, leaving the selection of the delivery point to the carriers, but warned the carriers that it did not demand delivery through the public stock yards at this station, and that if the Defendants chose to make delivery at that point (rather than at other available points within the same station limits), Defendants would be expected to absorb all extra costs arising from *their* selection of the public stock yards as the point of delivery.

Defendants chose to hire the public stock yards Company as their delivering agent, and surrendered possession of Plaintiff's property to that Company before making any tender thereof to Plaintiff. That Company refused

to surrender such property to Plaintiff unless and until, Plaintiff paid them an extra charge, assessed as compensation for the use of stock yards property contracted for by Defendants.

Plaintiff demanded that Defendants pay the charges of the Defendants' agent, the Stock Yards Company, or deliver direct to Plaintiff elsewhere at this station. Defendants refused to do either. Plaintiff paid the charges of the Stock Yards Company under protest, demanded repayment from the Defendants, and brought this suit for the damages arising from Defendants' wrongful delivery to the Stock Yards Company, rather than to Plaintiff, the consignee named in the bill of lading contracts.

SPECIFICATION OF ERRORS.

1. Said Circuit Court erred in declining jurisdiction of an action for damage arising from no violation of any provision of the Commerce Act, by any carrier subject thereto; and in holding that the Commerce Commission had exclusive jurisdiction of a cause of action in no way grounded upon a violation of that Act.

2. Said Circuit Court erred in holding that the District Courts of the United States (or the State Courts) were without jurisdiction to hear a case brought against a common carrier for mere overcharges above tariff rates, collected in violation of Section 6(7) of the Commerce Act.

3. Said Circuit Court erred in holding that an action for damages arising from a common carrier's wilful delivery of Plaintiff's property, to a third person, knowing that such person was *not* authorized to receive it as Plaintiff's agent, (such delivery being made before any tender of the property had been made to Plaintiff, and before Plaintiff had been afforded any opportunity to receive or remove it), while the property was still in carrier's cars on carrier's tracks; said delivery being made with full knowledge that said third person would *never* surrender the property to the owner except on the payment of additional moneys which said owner had not contracted to pay; involved *any* administrative question requiring prior recourse to the Commerce Commission.

4. Said Circuit Court erred, on motion to dismiss, in disputing and challenging, rather than accepting the facts plainly alleged in the complaint, and in substituting *ex parte* facts for the admitted facts, as the basis for its decision on the question of jurisdiction.

5. Said Circuit Court erred in holding that a common carrier could create an administrative question by its wilful and selective act, and thereby deprive the State and Federal Courts of jurisdiction (which they would have had but for such selection), of a cause of action for damages directly resulting from such wilful and selective act.

6. Said Circuit Court erred in holding that a common carrier by railroad could alter and change its contractual obligations, and common law duties to a shipper by a wilful and deliberate selection of one point, rather than any other point within the limits of the same station, as the point of delivery of the shipment transported.

7. Said Circuit Court erred in holding that a recovery of overcharges, collected in violation of Section 6 of the Commerce Act, could not be had if such overcharges were reasonable, under Section 1 of the Commerce Act.

8. Said Circuit Court erred in holding, with no knowledge of what the evidence would be in this case, or what it was in the case of *Swift* v. *Alton Railroad,* that the Commission's decision of that case was "against Armour," and "stood in Armour's way," when the facts, the contractual status of the parties, and the questions of law involved in the two cases were entirely different.

SUMMARY OF ARGUMENT.

Point 1.

Unless the complaint alleges a cause of action of which the jurisdiction of the Commission is exclusive, the decisions of the Circuit Court must be reversed. The existence of concurrent jurisdiction of Courts and Commission is not sufficient to sustain the decisions below. (Pg. 11, *Post.*)

Point 2.

The cases of which the Commission has exclusive jurisdiction have recognized fundamental characteristics.

(1) They must involve *some* violation of *some* provision of the Commerce Act by a common carrier subject thereto.

(2) The violation of the Act must be one which exists or does not exist, depending upon whether, in the administrative judgment of the deciding tribunal, the evidence warrants the factual conclusion that the acts complained of fell within a generic description, forbidden by the Act; i. e., unreasonable, preferential, etc.

If either of these conditions be absent, there can be no exclusive jurisdiction by the Commission. (Pg. 12, *Post.*)

Point 3.

The complaint here contains no assertion that any Defendant carrier subject to the Act in any way violated any provision of that Act. (Pg. 17, *Post.*)

Point 4.

The Court's assumption that the complaint establishes an assertion of overcharge, in violation of the Act, is grounded upon a denial of certain allegations of the complaint and a complete misconception of the contractual status of the parties established by the complaint. (Pg. 18, *Post.*)

(a) Even if the complaint alleged an overcharge in violation of Section 6(7) of the Act, no decision of the administrative questions referred to is required to determine that violation. (Pg. 19, *Post.*)

Point 5.

The Circuit Court creates the only administrative question upon which its decision is grounded, by failing to accept the facts alleged in the complaint as true; thereby creating a contractual status between the parties which never existed. (Pg. 21, *Post.*)

(a) No act or wish of the Plaintiff caused the livestock in question to move through the public stock yards. (Pg. 24, *Post.*)

(b) "Union Stock Yards, Illinois", is a tariff station, within the limits of which is located the public stock yards. Plaintiff billed its traffic for delivery anywhere at this station, and not at the public stock yards. (Pg. 27, *Post.*)

(c) If the allegations of the complaint were merely doubtful or uncertain, the motion to dismiss should be denied. (Pg. 30, *Post.*)

(d) The public stock yards were used for these shipments solely because the carriers elected to make delivery there, rather than on team tracks or elsewhere at "Union Stock Yards, Illinois". (Pg. 31, *Post.*)

(e) Had the carriers paid the agent they hired, their selection of the public stock yards could have afforded no cause for complaint. (Pg. 31, *Post.*)

(f) The Court has substituted the contractual status found in other decisions, for those alleged in the complaint, thus creating the administrative questions named. (Pg. 33, *Post.*)

Point 6.

The decision of the Circuit Court is in conflict with the great weight of authority, either as to the jurisdiction of a cause of action involving no violation of the Commerce Act, or as to the jurisdiction of an action alleging a mere overcharge in excess of the tariff rate applicable. (Pg. 35, *Post.*)

Point 7.

The collection of an overcharge is positively prohibited by Section 6 of the Commerce Act. The Circuit Court has held it cannot be recovered unless it is also unreasonable, under Section 1 of the Commerce Act. (Pg. 37, *Post.*)

ARGUMENT.

POINT 1. UNLESS THE COMPLAINT ALLEGES A CAUSE OF ACTION OF WHICH THE JURISDICTION OF THE COMMISSION IS EXCLUSIVE, THE DECISION OF THE CIRCUIT COURT MUST BE REVERSED. THE EXISTENCE OF CONCURRENT JURISDICTION OF COURTS AND COMMISSION IS NOT SUFFICIENT TO SUSTAIN THE DECISIONS BELOW.

There is involved here a controversy between a shipper and a railroad. The basic question presented is whether that controversy is one which, under the provisions of Section 9, 12(1), 13(1), 15(1), 16(1) and 22 of the Act to Regulate Commerce, lies within that limited jurisdictional field requiring prior resort to, and consideration by, the Interstate Commerce Commission; or whether it may be classified with that larger class of cases, of which the courts original jurisdiction was preserved by Section 22 of the Commerce Act. We are concerned only collaterally with its classification with cases where Commission jurisdiction is optional and alternative, under Section 9 of the Commerce Act, for if it be within that class, the mere selection of the courts by the Plaintiff conclusively vests jurisdiction therein.

It follows therefore, that Plaintiff's burden of proof is *negative in nature*. If it be established that this case is *not* one of the limited class of which the Commission has exclusive jurisdiction, it matters not whether the court's jurisdiction is exclusive, or merely concurrent.

POINT 2. THE CASES OF WHICH THE COMMISSION HAS EXCLUSIVE JURISDICTION, HAVE CERTAIN RECOGNIZED FUNDAMENTAL CHARACTERISTICS:

(1) THEY MUST INVOLVE SOME VIOLATION OF SOME PROVISION OF THE COMMERCE ACT, BY A COMMON CARRIER SUBJECT THERETO, AS THE JURISDICTION OF THE COMMERCE COMMISSION IS REPEATEDLY LIMITED IN THE ACT TO A CONSIDERATION OF VIOLATIONS OF THAT ACT. (SEC. 9, 12(1), 13(1), 15(1), 16(1), TITLE 49, U. S. C. A.)

(2) THE LEGAL VIOLATION OF THE ACT CLAIMED, MUST EXIST OR NOT EXIST, DEPENDING UPON WHETHER, IN THE ADMINISTRATIVE JUDGMENT OF THE DECIDING TRIBUNAL, THE EVIDENCE WARRANTS THE INTERMEDIATE FACTUAL CONCLUSION THAT THE ACT, RATE, OR RULE COMPLAINED OF MAY BE CLASSIFIED AS UNREASONABLE, DISCRIMINATORY OR WITHIN ANY OTHER LIKE GENERIC CLASSIFICATION OF THINGS FORBIDDEN BY THE ACT.

We shall not consume much space reviewing the prior decisions of this Court, and establishing the principle of law which this Court has applied in disposing of previous cases, as within one group or the other, with resulting jurisdiction in the courts, or the Commission. An historical recital of them, and a brief summary of the principles established therein will suffice; for, in the final analysis, we must examine *this* case, and apply those recognized principles to the facts actually presented here. Therefore we shall shrink our statement of legal principles, and stress our analysis of the facts of record, *i. e.*, in the complaint, in the case at bar.

The existence of the two characteristics of this class of cases requiring primary resort to the Commission, is established by a brief consideration of the history of the litigation of this question before this Court.

Originally, the jurisdiction of all controversies between shippers and carriers lay in the courts. (*Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 at 436.) By passage of the Commerce Act the Congress codified some of the preexisting common law liabilities and created new duties and liabilities for common carriers. And most important was the creation of

the new tribunal, the Commission, and the extension of its jurisdiction to hear complaints "of anything done or omitted to be done by any common carrier * * * *in contravention of any of the provisions hereof.*" (Sec. 13(1), Title 49, U. S. C. A.) Also, the creation of the power in the Commission to hear such a complaint, and order carriers to cease and desist from acts found to be "unjust * * * or otherwise *in violation of any of the provisions of this part* (Act)"; the power to award damages "under the provisions of this part (Act) *for a violation thereof*" (Sec. 16(1), Title 49, U. S. C. A.); the limitations of the general powers of the Commission to "execute and enforce the *provisions of this part* (Act)" (Sec. 12, Title 49, U. S. C. A.); and the limitations of the alternative jurisdiction found in Section 9 (Title 49, U. S. C.) to actions for damages "for which such common carrier may be liable *under the provisions of this part* (Act)", all express, in various ways, the intent of Congress to *limit the Commission's jurisdiction to causes of action grounded upon a violation of the Commerce Act, by a carrier subject thereto.*

The fact that many acts were prohibited, both at common law and by the Act; the fact that Section 22 of the Act appeared to preserve *all* existing common law rights and remedies, in both the State and Federal Courts; and the fact that Section 9 limited the alternative jurisdiction to the Commission, and the federal (not state) courts, gave rise to a jurisdictional confusion, to clarify which a long line of decisions of this Court were required.

The first decision of this Court upon this question was the *Abilene* case. (204 U. S. 426.) In that case and others like it, this Court ruled that the question of whether a given set of facts could be deemed to show reasonable (and therefore lawful) or unreasonable (and therefore unlawful) conduct by the carriers, was not an ordinary question of fact, but was a question requiring the exercise of the informed and experienced judgment

of the single tribunal created for the specific purpose of administering the act alleged to be violated. Such was the gravamen of this Court's decision in *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304; *Texas & Pacific Ry.* v. *American Tie and Timber Company*, 234 U. S. 138; *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43; *Baltimore & Ohio R. Co.* v. *U. S. ex rel. Pitcairn*, 215 U. S. 481; *Mitchell Coal and Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, and *Director General* v. *Viscose Co.*, 254 U. S. 498.

But not always were the carriers successful in escaping the jurisdiction of the state or federal courts, on their plea of exclusive jurisdiction of the Commission. Whenever this court found that the legal wrong upon which the case was founded, was *not* a violation of the Commerce Act, it sustained the primary jurisdiction of the courts. Strangely the first of these cases involved the very breach of duty alleged in the complaint here, a failure to properly and lawfully deliver property transported. (*Galveston, Harrisburg and S. A. Ry.* v. *Wallace*, 223 U. S. 481.) To the carrier's plea of exclusive Commission jurisdiction, under the precedent of the *Abilene* case (204 U. S. 426), this court summarily distinguished the two cases in this language, at page 490 (emphasis supplied):

> "But damage caused by failure to deliver goods is in *no way traceable to a violation of the Commerce Act*, and is *not* therefore within the provisions of Sections 8 and 9 of the *Act to Regulate Commerce*. (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 208.)"

In *Pennsylvania* v. *Puritan Coal Mining Co.*, 237 U. S. 121, the Court again distinguished the case from the Abilene case and similar cases by pointing out, at page

132, that "the pleadings contain no reference to the Commerce Act". 'Such is the case at bar. To the same effect was *Eastern Ry. of New Mexico* v. *Littlefield*, 237 U. S. 240; *Illinois Cent. R. Co.* v. *Mulberry Coal Co.*, 238 U. S. 275; and *Pennsylvania R. Co.* v. *Clark Coal Mining Co.*, 238 U. S. 456.

We do not mean to imply that the court's decisions made the line of demarkation dependent solely on whether or not a violation of the Act was involved. We merely state the negative,—that *no* case was *ever* committed to the exclusive jurisdiction of the Commission unless a violation of the Commerce Act was involved. This is important, for, as we shall show later in this case, *no* carrier is here alleged to have violated *any* provision of the Commerce Act. The damage sought to be recovered arose solely from the *carriers' selection of a public stock yard, rather than a team track or elsewhere, as the point of delivery,* and *from their failure to pay the agent they had hired.*

Having established the violation of the Commerce Act as the first line of demarkation, this Court often has crossed the line and considered cases where violations of the Act *were* involved, but where the violation could be established without the need of discretionary consideration of evidence leading to *factual* conclusions of reasonableness, etc., upon which the *legal* conclusion of lawfulness or unlawfulness must rest.

Thus, in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 240, a shipper sued for an overcharge, clearly a violation of Section 6(7) of the Commerce Act. But this Court denied the carrier's plea of primary Commission jurisdiction on the ground that no experienced judgment was required to read the English language contained in a railroad tariff and decide

whether the applicable rate was this or that. So, in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, this Court found that while the Commerce Act required the carriers to furnish cars, and their failure to do so violated that Act, the Courts could hear and decide a shipper's claim for damages for their failure to furnish them.

Suffice it to say, that having first found a *possibility* of exclusive jurisdiction in the Commission by a finding that a violation of the Commerce Act *was* involved, there remains the necessity for determining whether that violation could be established by simple facts, or whether intermediate factual conclusions were required to be reached, thus presenting a question necessitating experienced, advised, and specially qualified judgment, or requiring the exercise of administrative discretion.*

We therefore approach this case from this angle.

1. Does this case involve,—and is Plaintiff's claim for damages based upon,—a violation of the Commerce Act by any Defendant thereto? If not, the Commission *can* have no jurisdiction, and the forum remains where it always was, the Courts, by virtue of Section 22 of the Commerce Act. (Title 49, U. S. C. A.)

2. Even if the case involves a violation of the Act, can that violation be established by a consideration of simple facts, or is some degree of experienced judgment and administrative discretion required to interpret those facts and reach that *intermediate factual conclusion of reasonableness,* etc.? Unless such be required there can be nothing more than concurrent jurisdiction in the Commission,

* Certain decisions of the State and Federal Courts use the loose language that resort to the Commission must be held where "questions of fact" are involved. It is obvious that any controversy between a shipper and carrier may involve a question of fact. A question of fact was involved in *Galveston, H. & S. A. Ry.* v. *Wallace*, and in the other cases cited at p. 14, *supra*. The "question of fact" requiring primary resort to the Commission, is really a question of *factual conclusion* (*e. g.*, reasonable or unreasonable) from which the legal conclusion (*i. e.*, lawful or unlawful) is drawn.

which, if existing, demands reversal of the Court below from the mere fact that Plaintiff elected the courts, rather than the Commission, as the tribunal that should hear its grievance.

POINT 3. THE COMPLAINT ALLEGES NO VIOLATION OF ANY PROVISION OF THE COMMERCE ACT, BY ANY CARRIER SUBJECT THERETO.

The absence of any such allegation can be established only after an unsuccessful search of the entire complaint. But it is significant that the Court specifically finds that no challenge of the reasonableness of any charge paid (under Section 1 of the Act) exists. (R. 81.) Nor does the Court find any violation of the Act to be involved in the complaint except an "overcharge" alleged to have been made in violation of Section 6(7) of that Act. (R. 82.)

It follows that if we establish either or both of two conditions, viz.:

(1) That the Court misconstrued the complaint, and no overcharge *is* in fact alleged, or;

(2) That the administrative consideration described by the Court, has no bearing upon the existence or non-existence of the overcharge,

we remove one or the other, or both, of the two essential conditions precedent to any jurisdiction of the Commission. If the Court misconstrued the complaint in this respect, no violation of the Commerce Act is involved and the jurisdictional requirements of Sections 9, 12(1), 13(1), 15(1) and 16(1) are not met.

On the other hand, if an overcharge is involved, but may be determined independently of the administrative matters discussed, the second condition precedent to Commission jurisdiction is done away with, and under the decision of this Court in the *Great Northern* case (259 U. S. 285), only concurrent jurisdiction by the Commission is established and the Plaintiff's election of the Courts is final.

To determine whether or not the Court misconstrued the complaint; whether a violation of Section 6 is alleged therein; and whether the administrative questions cited by the Court have any bearing upon the existence or nonexistence of such violation, it is necessary to clearly understand the facts alleged in the complaint, and *particularly the contractual status of the parties created by those facts.* And only from such an understanding can we establish the error of the Circuit Court in both the above respects.

POINT 4. THE COURT'S ASSUMPTION THAT THE COMPLAINT ESTABLISHES AN ASSERTION OF OVERCHARGE, IN VIOLATION OF THE ACT, IS GROUNDED UPON A DENIAL OF ALLEGATIONS OF THE COMPLAINT, AND A COMPLETE MISCONCEPTION OF THE CONTRACTUAL STATUS OF THE PARTIES ESTABLISHED BY THE COMPLAINT.

Two conditions must be met, before a shipper can be said to have paid an "overcharge" in violation of Section 6(7) of the Commerce Act. Those conditions are:

1. There must have been a *transportation contract,* into which were read the charges named in published, applicable tariffs, by operation of law. A mere payment of money by an individual to a person who happens to be a common carrier does not constitute an overcharge in violation of the Commerce Act.

2. The payment made by shipper on such transportation contract, to the contracting carrier, must be greater than authorized by the published tariffs constituting a part of that contract, and applicable to the shipment.

The only common carriers with whom the Plaintiff had any transportation contract, were the several Defendants (Complaint Par. 9) (R. 9). The payments made to those Defendants were the *exact amounts named in their tariffs for the service named in the contract; i. e.,* "In accordance with the tariffs * * * applicable". (Complaint Par. 12; R. 9.)

The sums paid out by Plaintiff to the Yards Company, as ransom, were *not* tariff or transportation charges of *any* common carrier (Complaint Par. 28, 31; R. 17, 19). They were paid to the Stock Yards Company under protest (Complaint Par. 32; R. 19). While the Stock Yards Company has been held to be a common carrier, Plaintiff had no transportation or other contract with that Company, as to the shipments in question (R. 10, 12; 37, 38).

Nor, can the theory of overcharge made by the carriers through a selected agent, be sustained. First, they were not transportation charges or charges published in any tariff (R. 17, 19). Nor did the stock yards exact this money as the agent of anyone, least of all the carriers. The Yards Company's letter (Ex. B, Complaint; R. 35, 36) clearly evidences the fact that these charges were collected for *its own* account, for use made of *its own* private property, which no Defendant carrier owned or controlled. (R. 35, 36).

Thus every theory upon which the Court's lone violation of the Commerce Act (the violation of Section 6 (7)) can be predicated, is negatived by the complaint.

There being no claim advanced of any violation of *any* other section of the Commerce Act, by any carrier subject thereto, there can be no jurisdiction of the Commission, as no violation of any section of the Act is involved.

(a) EVEN IF A CLAIM OF OVERCHARGE WERE FOUND IN THE COMPLAINT, IT IS NOT NECESSARY TO PASS UPON ANY ADMINISTRATIVE QUESTION REFERRED TO, IN ORDER TO DECIDE WHETHER PLAINTIFF WAS OVERCHARGED, AND THE ACT THUS VIOLATED, OR NOT.

As we have said, two simple facts are necessary to establish an overcharge, in violation of Section 6. They are:

1. That the tariff rate was, say $1.00.
2. That Defendant collected $1.10.

In the case at bar the tariff rate is not named. It is merely alleged that the exact tariff rate was paid (R. 9). But may we assume that the tariff rate was $200.00, per car, and that the Plaintiff paid that amount and $20.00 per car additional. And let us assume that both these amounts were paid *to Defendant carriers,* so that a clear violation of Section 6 will result.

The ultimate and constitutive facts which the tribunal hearing such a case must find, are the answers to these questions:

1. What was the tariff rate?
2. What did the Plaintiff pay?

The administrative question referred to by the Court, throw no light upon either question.

Can the nature of the service, of the Stock Yards Company (whether a carrier or a stock yard service) throw any light on what the tariff rate was, or what amount the shipper paid?

Does "recourse to certain facts, such as the history of the Chicago Stock Yards" or does "the use of those yards as the carriers usual place of delivery"; or does "the history of the yardage charge" (R. 84) throw any light upon what the tariff rate was? Or on what the shipper paid?

Does the existence, or nonexistence, or the details of a "tri-party relation" change the tariff rate? Or the amount which the shipper paid?

Does "inquiry into the history, usages, and actual conditions of operation at the stock yards" throw any light on what rate was in the tariff, or what the Plaintiff paid?

It is evident that, no doubt influenced by the Section 1 issue existant in the *Atchison* case (295 U. S. 193) and in the *Swift* case (238 I. C. C. 179) the Circuit Court lost

sight of the fact that the court itself, had found that there were no issue of reasonableness in this case (R. 81). It lost sight of the fact that, relevant as those questions might be if damages arising from violation of Section 1 were here involved, they are not relevant here, because the Court itself finds that the only violation of the Commerce Act involved here, is an *overcharge*, and not an unreasonable act. And the history of the yards, the yardage charges, etc., have no evidential value in determining what tariff rate was applicable to the shipment, or what amount, over and above that rate, was paid by Plaintiff.

Summarizing:

> The complaint involved no violation of Section 6(7) or of any other section of the Commerce Act. Therefore, the Commission cannot have jurisdiction.
>
> Even if the violation of overcharge be assumed, the administrative facts throw no light upon whether or not such violation existed, and the Court has concurrent jurisdiction.

We may now turn to the Court's refusal to accept other facts alleged in the complaint, and to the legal effect of such nonacceptance.

POINT 5. THE COURT CREATES THE ADMINISTRATIVE QUESTION UPON WHICH ITS DECISION HINGES, BY FAILING TO ACCEPT THE FACTS ALLEGED IN THE COMPLAINT AS TRUE; THEREBY CREATING A CONTRACTUAL STATUS BETWEEN THE PARTIES WHICH NEVER EXISTED.

We now come to a consideration of the factual case actually before the court. The complaint involves livestock shipped by the Plaintiff and reaching Chicago via the lines of the defending railroads. Waiving for the moment the responsibility for such selection, they were delivered through the pens and facilities of the public stock yards at that point.

This Court has considered several cases involving deliv-

eries of livestock by common carriers, at public stock yards. The first of these was *Covington Stock Yards* v. *Keith,* 139 U. S. 128. Two other cases involved deliveries of livestock at these very Chicago public yards (*Adams* v. *Mills,* 286 U. S. 397) (*Atchison, Topeka & S. F. Ry.* v. *U. S.,* 295 U. S. 193). An important distinction between the contractual status of the parties in these cases should be noted at the outset.

In the *Covington* case (139 U. S. 128), the *carrier alone* selected the public stock yards as the delivering point in Covington, against the shipper's desire.

In the *Adams* case (286 U. S. 397), the shipper appears to have consented and acquiesced in the carrier's selection of the public stock yards as the delivering point.

In the *Atchison,* case (295 U. S. 193) the *shipper* selected the public stock yards as the delivering point. This is clearly stated at page 195 of that decision.

It is conceivable that the liability for the extra cost occasioned by the use of a public stockyards for delivering livestock shipments, might depend upon the contractual status existing between the parties, and upon the determination of *whether the shipper, or the carrier* selected that point within the station limits as the point of delivery. Therefore it is important to determine exactly what the fact is in this case, in this respect.

As revealed by the decision of the Circuit Court (R. 92) the Chicago Public Stock Yards may have been used as the point of delivery of the shipments in question, under any one of several contracts:

First, the *shipper* may have specifically directed delivery at the public stock yards. If so, it may be argued that, having deprived the carrier of its option of selecting the delivery point within the station limits, the shipper impliedly assumed any extra expense resulting from the carrier's performance of shipper's

directions. This was the factual situation, and the contractual status of the parties in *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193. At page 195, this is clearly stated.

Second, the deliveries may have been made at the public yards by the carriers, in accordance with years of custom and usage, and the *shipper's acquiescence* therein assumed, from his failure to complain over such deliveries. In such case there might be said to be a "tri-party relation" between shipper, railroad and Stock Yards Company. This appears to be the factual situation, and the contractual status presented to this Court in *Adams* v. *Mills,* 286 U. S. 397, where consignees places of business were within the public yards area, and final delivery was made there.

Third, the deliveries may have been made at the public yards by the carriers *over the shipper's protest* and against his desire, or without his acquiescence in any such practice. In such cases, it could not be said that the shipper was in any way responsible for the use of the public stock yards, or for the costs arising from such use. Such was the situation in *Covington Stock Yards* v. *Keith,* 139 U. S. 128.

The Circuit Court clearly finds that the carriers concurrently made deliveries of livestock at this station at *several* places, viz., at the public yards, at team tracks, on industry tracks and elsewhere. It finds that any one of these places of delivery were available at the destination in question. (R. 92.)

With this election available, what light does the complaint throw upon this question?

Who hired the facilities of the public stock yards, at this station, for the delivery of the Plaintiff's shipments, and *thereby became responsible for the cost of their use?*

(a) NO ACT OF THE PLAINTIFF CAUSED THE LIVESTOCK IN QUESTION TO MOVE THROUGH THE PUBLIC STOCK YARDS.

That Plaintiff did not demand, nor request, nor concur in, any use of the public stock yards facilities is clearly established by the following allegations of the complaint:

> "That the Plaintiff had at *no* time prior to receipt of such notice, as to any of such shipments, *exercised any dominion or control,* or *given any direction* either to the *Defendant* transporting any such shipment, or to Defendants' agent, the said Stock Yards Company, as to the *time or manner of unloading, the platform at which, or the chutes or pens through or into which the said livestock was to be unloaded, or held pending tender of delivery* or in *any way directed or controlled, or attempted to direct or control either the Defendants, or any of them, or the said Stock Yards Company, in respect to unloading, yarding, driving, or handling of any shipment of said livestock,* nor had any tender of any of said shipments been theretofore made to Plaintiff, either by the Defendant who transported the same to Union Stock Yards, or by the Stock Yards Company." (R. 10; complaint Par. 14.)
>
> "On May 9, 1933, Plaintiff notified each of the Defendants, and their agent, the Stock Yards Company, in writing, that on and after May 25, 1933, it would accept delivery of all shipments of livestock * * * *either* at the unloading chutes" (of the public stock yard) "*or at such other point* at which delivery of such livestock was tendered by Defendants, *or* by their agent" (the yards company). (Complaint Par. 16, R. 11.)
>
> "Thereafter, on May 16, 1933, Plaintiff notified each of said Defendants of the aforesaid * * * demands of *their said unloading and delivering agent,* the Stock Yards Company, * * * and notified each of said Defendants, and their agent, * * * that on and after May 25, 1933, the said Stock Yards Company would have *no authority* after unloading said livestock, to accept, or receipt therefor in Plaintiff's name, or for its account; that any delivery of Plaintiff's livestock * * * to the said Stock Yards Company (other than delivery as Defendant's unloading and delivering agent) would *constitute a conversion of Plaintiff's property.*" (Complaint Par. 18; R. 12.)

The exact language of the letter pleaded in the above paragraph was:

> "You are hereby notified that on and after May 25th, 1933, the Union Stock Yards & Transit Company of Chicago, Ill. has no authority, after unloading such livestock, as your agent, in accordance with its tariff, to thereafter accept, or receipt for such livestock for us, as our Agent, for our account, or in our name."
>
> "On and after May 25, 1933, any delivery by your railroad of our livestock to the Union Stock Yards & Transit Company, of Chicago, Illinois (other than a delivery of such livestock to the Union Stock Yard & Transit Company, as *your agent,* for unloading *and delivery to us*) will constitute a conversion of our property." (Complaint Ex. E; R. 36.)

That there was no semblance of any express or implied contract between Plaintiff and the Stock Yards Company with reference to this livestock is further established by the following:

> "And at the same time, Plaintiff notified the said unloading agent of the carriers, viz., the Stock Yards Company * * * that on and after May 25, 1933, it would accept delivery of such livestock at the unloading chutes, *or at any other point where tender was made,* * * * and that on and after said date Plaintiff did not desire and would not accept or pay for any service rendered to, or facilities used by said livestock, beyond the point at which it was ready to accept such livestock, *when and where tendered,* * * * and that on and after said date the Stock Yards Company had no authority to accept, handle, or receipt for such livestock, as agent of the Plaintiff * * *." (Complaint Par. 18; R. 12, 13.)

The exact language of the notice was:

> "You are hereby advised that any and all livestock which, on or after May 25, 1933, *may* be delivered to you *by said carriers as their agent,* for unloading, and for delivery to us as consignee, in accordance with the respective contracts of carriage covering same,

> will be accepted and received by us, *from said carriers* (or from you as *their agent*) * * * that as to such stock, we *do not desire,* and *will not accept,* receive or pay for *any service or use of facilities* beyond the unloading pens which you provide *for the carriers as their agent.* * *. * that on and after said date you have no authority to accept, handle or receipt for such livestock, after unloading and until delivery to us, as our agent, in our behalf, in our name, or for our account." (Complaint Ex. F; R. 37-38.)

That no use of the public stock yards facilities was demanded by Plaintiff, for the future, is evident from the prayer of the complaint. Keeping in mind that the tariff station * "Union Stock Yards, Illinois", is not shown to be synonymous nor coextensive with the public stock yards located within the station limits (and for which the tariff station was named), (See pp. 27-30 *post*), the following prayer clearly makes any use of the public stock yards as the point of delivery, *entirely optional with the carrier.*

> "That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it at *Union Stock Yards, Illinois,* at the unloading pens of the Defendants *in the Union Stock Yards,* Chicago, Illinois, *or at such other point as same may be tendered* upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposititon of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, or *of any other person, firm or corporation;"*

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* "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits'. Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry." (*United States* v. *American S. & T. Plate Co.*, 301 U. S. 402 at 409.)

(b) **"UNION STOCK YARDS, ILLINOIS", IS A TARIFF STATION, WITHIN THE LIMITS OF WHICH IS LOCATED THE PUBLIC STOCK YARDS. PLAINTIFF BILLED ITS TRAFFIC FOR DELIVERY ANYWHERE AT THIS STATION, AND NOT AT THE PUBLIC STOCK YARDS.**

Did the Plaintiff by billing its shipments to "Union Stock Yards, Illinois" thereby select the public stock yards, located within the limits of that station, as the delivering point?

It is not infrequent practice for a railroad station to be named after one of the principal industries located within the limits of that station. But it may not be assumed that in such cases, the industry, and the tariff station are identical, synonymous, or co-extensive.

The complaint alleges:

> "That each of Defendants * * * holds itself out, to transport * * * livestock * * * to *Union Stock Yards, Illinois* * * * and * * * does regularly transport * * * such livestock at rates named in tariffs lawfully on file * * * to *Union Stock Yards, Illinois,* and has for many years held itself out as being ready, able and willing to deliver livestock to consignee, * * * at and from *a* station or depot *located at,* Union Stock Yards, Illinois." (R. 7.)

Careless reading, ignoring the emphasized words, might lead to the assumption that "Union Stock Yards, Illinois" meant the public stock yards, and that when Plaintiff billed its shipments to "Union Stock Yards, Illinois" it was selecting the public stock yards as its point of delivery.

But other language in the complaint, permits no such interpretation. The public stock yards at Chicago is specifically described in Paragraph 3 of the complaint. (R. 6.) Its existence as a public yards is established in Paragraph 6. (R. 7.) The prior and continued use of the public yards as a livestock terminal is described in Paragraph 3. (R. 6.)

Two allegations of the complaint clearly describe the

public stock yards as *but one point within the limits of the tariff station, "Union Stock Yards, Illinois."* Those allegations appear in Paragraph 4 and 5 (R. 6, 7) as follows:

> "* * * defendants * * * have * * * continuously kept on file * * * their tariffs stating the rates * * * to their said station or depot *at* Union Stock Yards, Illinois." (R. 6.)

This allegation refers solely to publication of rates to the public stock yards which are located "*at* Union Stock Yards, Illinois."

The following paragraph covers the carriers' publication of rates to other points at the same station (referred to by the Circuit Court at R. 92), but *not specifically to the public stock yards.* The distinction between the public stock yards, and the railroad station named after them; and the inclusion of the former within the latter, is alleged as follows:

> "That each of said Defendants * * * now holds itself out, to transport * * * livestock * * * to *Union Stock Yards, Illinois, at which* Defendants maintain their common livestock depot * * *." (R. 6, 7) (viz. the public stock yards.)

The prayer of the complaint clearly distinguishes between the public stock yards, and the station "Union Stock Yards, Illinois."

> "That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it *at Union Stock Yards, Illinois,* at the unloading pens of the Defendants *in the Union Stock Yards,* Chicago, Illinois, *or at such other point as same may be tendered,* upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, *or of any other* person, firm or corporation." (R. 21.)

The constant alternatives; (either the Defendants, *or* their said agent,—the Defendants *and* their said agent);—(at the unloading chutes, *or* at such other point at said station); appearing throughout Paragraphs 14, 15, 16, 24 and 25 (R. 10, 11 and 16); the constant reference to the Yards Company solely as Defendants' agent; the lack of any reference to the public stock yards in the statement of injury (R. 15); the negation of any demand for any use of stock yard property (R. 10), and the expressed willingness to accept delivery *wherever* tendered (on or off the stock yards property) (R. 16); the continuing demand for delivery at the station designated in the tariffs viz. "Union Stock Yards, Illinois," without reference to any use of the public stock yards (R. 16); the carriers' failure to protest to their agent or to make *different* arrangements, at the station of defendants (R. 17); all combine to establish that the public stock yards was *merely a point included within the limits of the tariff station named after it.*

And finally, the alternative breach alleged, and the alternative prayer of the complaint, permit of no other conclusion:

> "* * * Defendants have breached each of their several transportation contracts * * * in failing to afford to Plaintiff, an opportunity of receiving its livestock * * * *from the unloading pens used by Defendants*" (*i. e.* the public stock yards, see par. 7, R. 7) "*at* Union Stock Yards, Illinois, or *from any point* at which delivery thereof is tendered, which opportunity has in all cases been denied * * *." (R. 17.)
>
> "* * * the claim asserted by Plaintiff against each Defendant is identical, viz., a repeated failure to *provide a place* and facilities *for free delivery* to consignee of the livestock so transported." (R. 20.)
>
> "That upon due hearing the court adjudge and decree that the Plaintiff is entitled to the delivery of livestock consigned to it, at Union Stock Yards, Illinois, at the unloading pens of the Defendants in the Union Stock Yards, Chicago, Illinois, *or at such other*

point as same may be tendered, upon Plaintiff paying, or making lawful arrangements to pay, the tariff rates and charges of the Defendants, applicable to such shipments, without the imposition of any charge or charges in addition thereto, and free from any lien or claim of the Stock Yards Company, *or of any other person,* firm or corporation." (R. 21.)

These, and other allegations of the complaint are utterly meaningless, unless the tariff station "Union Stock Yards, Illinois" is merely inclusive of the area occupied by the public stock yards, located within its limits.

(c) IF THE ALLEGATIONS OF THE COMPLAINT WERE MERELY DOUBTFUL, THE MOTION TO DISMISS SHOULD BE DENIED.

The unfortunate similarity between the name of the station described in Defendant carriers tariffs and the name of one of the industries located within the limits of that station, is no doubt confusing and has apparently confused the court below. But Plaintiff is not responsible for this similiarity in nomenclature. In such a situation we think the court should *not* have assumed that the evidence offered in support of these allegations would establish the most limited interpretation of them. We think the Circuit Court, if in doubt, should have taken the position taken by this Court in *Kansas* v. *Colorado,* 185 U. S. 125, at page 147, where the broadest interpretation of the complaint was held to be the proper one on demurrer. This principle has recently been followed by the Circuit Court of Appeals for the Eighth Circuit in *Leimer* v. *State Mutual Life Assurance Co.,* 108 Fed. (2d) 302, the Court, after reviewing the effect of the new Rules of Civil Procedure applicable to the Federal District Courts, concludes its consideration of this subject on pages 305 and 306 by stating (emphasis supplied):

"We think there is no justification for dismissing a

complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to *no* relief under *any* state of facts which *could* be proved in support of the claim."

(d) THE RUBLIC STOCK YARDS WERE USED FOR THESE SHIPMENTS SOLELY BECAUSE THE CARRIERS ELECTED TO MAKE DELIVERY THERE, RATHER THAN ON TEAM TRACKS OR ELSEWHERE AT "UNION STOCK YARDS, ILLINOIS".

From the foregoing it is evident that the Plaintiff went no further than to name the tariff station at which deliveries were to be made. Whether the public stock yards, or the team tracks or industry tracks located at that station were used, was solely up to the carrier, with one qualification. If the carrier elected to use the public stock yards (rather than team tracks, industry tracks, or elsewhere), as the delivery point, they were placed on notice that Plaintiff *would bear no part of the extra cost arising from such use of the public stock yards by the carriers.*

It is clear from the complaint, and therefore undisputed, that *no contractual relation of any kind, existed between Plaintiff and the Stock Yards Company* after May 25, 1933. Such a relation *had* existed prior to May 25, 1933. (R. 10, 11.) But by written notices, dated May 9, 1933 and May 16, 1933, that contractual relation was totally ended. (R. 11, 12.)

(e) HAD THE CARRIERS PAID THE AGENT THEY HIRED, THEIR SELECTION OF THE PUBLIC STOCK YARDS COULD HAVE AFFORDED NO CAUSE FOR COMPLAINT.

If Plaintiff wished to escape the costs resulting from the use of the public stock yards as the delivering point, why did the Plaintiff not unqualifiedly *forbid any* use of the public stock yards?

The answer is found in the opinion of this Court in *Cov-*

ington Stock Yards v. *Keith*, 139 U. S. 128. In the closing paragraph of that opinion, this Court carefully preserved this right of the carrier *to select* a single point within its station limits, at which livestock deliveries should be made. It might even select a public stock yards, "and if the appellees had been permitted to use them without extra charge for mere 'yardage' they would have been without just cause of complaint in that regard." (139 U. S. at page 136.)

These Defendants had the legal right to select the Chicago Public Stock Yards as their livestock depot within the station limits. Plaintiff could not have lawfully forbidden delivery there. But Plaintiff could, and did, make the selection of those yards *solely the selection of the carriers,* and the responsibility for payment of the *costs resulting from such selection* solely the responsibility of the carriers.

The complaint establishes these facts beyond dispute:

1. That the public stock yards in Chicago, was but *one of several* available delivering points within the limits of Defendants' tariff station "Union Stock Yards, Illinois." (R. 92.)

2. That Plaintiff billed its shipments only to the tariff station, and *not* to the public stock yards, leaving it optional with the carrier to select any point within the limits of that station,—public stock yards, team tracks, industry tracks, or any other selected point,—as the point at which delivery would be accepted,—with the proviso that if Defendants selected the public yards, they must stand all added expense resulting from such selection.

3. That Defendants, being free to select team tracks, or any conceivable point within the station limits, selected the public stock yards; hired them to unload and deliver the animals, then refused to pay their selected agent the charges it demanded in consideration of the service the carriers had engaged, except the charge assessed for unloading.

(f) THE COURT HAS SUBSTITUTED THE FACTS, AND THE CONTRACTUAL STATUS EXISTING IN THE ATCHISON AND SWIFT CASES FOR THOSE ALLEGED IN THE COMPLAINT AND THUS CREATED THE ADMINISTRATIVE QUESTION WHICH IS MADE TO CONTROL.

There is no way in which the rights of a litigant can be more greatly prejudiced than by the Court's denial of jurisdiction of a cause, the denial being based upon a misconception or erroneous construction of the complaint.

Nor can we conceive of more appropriate grounds for intervention of this Court than in a case where there appears in the complaint a clear allegation of, let us say, diverse citizenship; and where the lower court denies jurisdiction on the sole ground that no such allegation appeared in the complaint.

We do not mean to imply that the Circuit Court wilfully misread or misquoted the complaint here. But from the fact that the decision states many historical facts, *not* from the record, but from the earlier decisions of this Court in *Adams* v. *Mills*, 286 U. S. 397, in *Atchison, Topeka & S. F. Ry.* v. *U. S.*, 295 U. S. 193, and other cases involving the Chicago yards, we believe the Court unwittingly gained the impression, and just assumed that the facts, and the contractual status set forth in those decisions, continued and still existed. In other words, we believe that the Circuit Court based its decisions upon the facts stated by this Court in its previous decisions with reference to *other* controversies, rather than upon facts alleged in the complaint, wherein the Plaintiff carefully placed the case on all fours with the *Covington* case (139 U. S. 128) and entirely differentiated this case from the *Atchison* case (295 U. S. 193 at 195) in this respect:

In this case, and in the *Covington* case, the expense of

using the private property of a third person as carriers delivering facility, arose solely because the carrier chose that point, against the desire of the shipper.

In the *Atchison* case, but *not* in this case, the *consignee* chose the public stock yards as the delivering point to serve some purpose of his own.

Wholly ignoring the lack of any contractual relation between the shipper and the public stock yard, the Court assumed this "tri-party relation" or contractual status. (R. 83, 84.) *From this assumption emerges the administrative question upon which hinges the Court's decisio...* The truth of this statement becomes evident by considering a few simple questions:

Had the carriers elected (as they might have done) to make *team track* delivery, what would have been the relevancy of the "practices at those yards" (R. 83); of "the practice of the carriers and the Yards Company" (R. 84), of "whether it (the service of the Yards Company) is one which the rail carriers are bound to furnish" (R. 84); of "the history of the Chicago Stock Yards; the use of those yards as the carriers' usual place of delivery; the history of the yardage charge." (R. 84.)

Or of what moment would any "inquiry into the history, usages, and actual conditions of operation at the stock yards" (R. 84) have been, *if carriers had chosen to tender delivery on team tracks?*

Thus, the *election of the carriers* creates the only administrative question pointed to by the Circuit Court.

POINT 6. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH THE GREAT WEIGHT OF AUTHORITY UPON A JURISDICTIONAL POINT; VIZ., THE DECISIONS OF THIS COURT; OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT; OF THE FEDERAL DISTRICT COURTS, OF THE STATE COURTS, AND OF THE INTERSTATE COMMERCE COMMISSION.

Several of the decisions with which the decision of the Circuit Court are claimed to conflict, are cited, and apparently followed by the Court. The departure from those decisions becomes apparent when we compare the legal conclusions of the Court, with the facts of record as they are, and the contractual status resulting, rather than with the facts and contractual status which the Circuit Court assumes to exist.

We have shown that the public stock yards became involved in this case solely through the act of the defending carriers, and that the administrative questions cited by the Court arose solely because of that selection by the carriers.

We have further shown that in fact there was no sum paid by Plaintiff to any carrier *with whom it had a transportation contract,* except the exact sum named in the tariffs of those carriers, and that no carrier violation of any provision of the Commerce Act caused the damage sought to be recovered.

In the alternative, we have assumed that a violation of Section 6(7) (overcharge), was asserted in the complaint. Upon that assumption we have shown:

(1) That no question, requiring any administrative judgment or discretion, had to be determined before either the rate named in the tariff, or the amount paid by the Plaintiff, could be ascertained, and the overcharge, or its extent, be determined. Or, conversely;

(2) That the administrative questions named by the Court had no bearing upon what the tariff rate was, or upon what amount the Plaintiff paid, hence could not determine whether overcharge existed or did not exist.

Applying the conclusions of the Court to the facts, and to the contractual status of the parties actually existing, we find some radical departures from the great weight of authority, not only upon the jurisdictional question, but upon the Federal law of common carriers.

A consideration of these instances brings us back to a ground previously established herein, viz., (1) that a violation of the Commerce Act is a first condition precedent to Commission jurisdiction; (2) that if a violation of Section 6(7) be assumed, the true facts here present no unusual question calling for the experienced discretion and informed judgment of the Commerce Commission.

One of the legal consequences of the Court's disregard of the fact that the carriers alone were responsible for the livestock ever going through the public yards is this:

If, on Shipment A, a carrier elects to make *team track* delivery, the consignee is entitled to a "mere way out to the public highways", which, as a matter of law is "incidental to, and part of delivery". (R. 80). But if, on Shipment B, a carrier elects to use a public stock yards, all these historical considerations arise, and only the Commission has jurisdiction to decide whether the consignee is entitled to get out without added expense or not. This is to hold that *the carriers' selection alone, may not only change its duties of delivery, but that such selection may determine the tribunal in which it may be sued.* This doctrine is obviously contrary to the ruling of this Court in *Coving Stock Yards* v. *Keith*, 139 U. S. 128.

This misconception of the contractual status of the parties has caused the Circuit Court to deny jurisdiction of a simple action for damages for wrongful delivery although this Court has specifically stated that such damages were "in no way traceable to a violation of the Commerce Act" (*Galveston, Harrisburg & S. A. Ry.* v. *Wallace*, 223 U. S.

481 and cases cited at page 20 of the petition herein), and notwithstanding that the Commerce Commission has from the beginning refused to take jurisdiction of such causes (see cases cited at page 22 of the petition herein and in Appendix B hereto).

The same misconception has caused the Circuit Court to deny jurisdiction of a cause where it points to no violation of the Commerce Act except a mere overcharge which this Court has held lay within the concurrent jurisdiction of the courts (*Great Northern* v. *Merchants Elevator Co.*, 259 U. S. 285).

In both these respects, the Circuit Court has decided contrary to decisions of the Court of Appeals for the Eighth Circuit in *National Elevator Co.* v. *Chicago, M. & St. P. Ry. Co.*, 246 Fed. 588, or *Empire Refineries* v. *Guaranty Trust Co.*, 271 Fed. 668. In the former it was held that jurisdiction of the courts and the Commission was concurrent, when the involved violation of the Act was mere overcharge, and in the latter, that the Court's jurisdiction was exclusive, where no violation of the Commerce Act was involved. We shall not repeat the many decisions of the other State and Federal Courts, following one or the other of these two latter cases (cited at pages 21, 22 of the petition herein).

POINT 7. THE COLLECTION OF AN OVERCHARGE IS POSITIVELY PROHIBITED BY SECTION 6 OF THE COMMERCE ACT. THE CIRCUIT COURT HAS HELD THAT IT MAY NOT BE RECOVERED UNLESS THE CHARGE MADE IS ALSO UNREASONABLE UNDER SECTION 1 OF THE COMMERCE ACT.

A startling result of this misconception is the holding of the Circuit Court to the effect that an overcharge collected in positive violation of Section 6(7) of the Commerce Act, *cannot be recovered unless it is also unreasonable,* and also in violation of Section 1 of the Act.

We turn to the Court's decision on rehearing, wherein it comments upon the contemporaneous decision of the Com-

merce Commission in *Swift & Company* v. *Alton Railroad Co.*, 238 I. C. C. 179.

We have previously pointed out that only in the *Covington* case (139 U. S. 128) has this Court *ever* considered a case on all fours with the case at bar; *i. e.*, a case where the use of public stock yard facilities for delivering livestock and the resulting expense, had been *forced* upon a shipper, without his desire, by the carrier's election. We have also pointed out that in at least two of the three cases decided by this Court, involving the carrier's delivering responsibility at the Chicago Stock Yards, the shipper had either directed or consented to the delivery through the public stock yards.

The *Swift* case (238 I. C. C. 179) recently decided by the Interstate Commerce Commission, like the two cases last above mentioned, also involves deliveries by carriers at the Chicago Public Stock Yards. And, like those two cases, it was decided on the theory that the stock yard delivery was there selected by the shipper. At page 189 of the decision the Commission stated:

> "It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards, *only* when complainant" (Swift) "*elects* to take delivery there."

Factually, that case and this, present this same great difference, in the contractual status of the parties: There, delivery at the public stock yards was at *shipper's* direction. Here, delivery there was solely at *carrier's* election. And, in both cases, *other points* of delivery at the same station were patently available. (238 I. C. C. at 189.) (R. 92.) As a result, the consignee's contractual relation to the public stock yards was entirely different in the two cases.

Legally, the cases present two wholly unrelated legal questions. The sole violation of the Commerce Act upon

which the Circuit Court here grounds its Commission jurisdiction, is "*overcharge*" in violation of *Section 6* of the Act. (R. 82.) The *Swift* case involved *only* a violation of *Section 1* of the Act, viz., an *unreasonable practice.* (Page 180 of that decision.)

The Circuit Court finds no assertion of unreasonableness, in violation of *Section 1* of the Act in this case. (R. 81.) But it holds that our complaint alleges that the carriers violated Section 6 of the Act, and charged us more than their tariffs permitted (R. 82) on traffic which went to the public stock yards only because carriers elected to take it there.

This Court has held that cases involving violations of Section 1 (unreasonableness) were exclusively for the Commission (*Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426). This Court has held that cases involving only "claim based on overcharge, plainly a violation of the statute" (R. 82) might be decided by the courts, without prior recourse to the Commission (*Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 240). Therefore, merely because the *Swift* case, involving *only Section 1* was submitted to and decided by the Commission, it does *not* follow that this case involving, as the Court says, merely a violation of the overcharge Section, (6), must also be submitted to the Commission. Yet the Circuit Court has ruled otherwise. (R. 82.)

The Circuit Court has gone further than this. It has held that the Swift case, involving only *Section 1* of the Act, makes this case, which the Court itself says involves only *Section 6, res adjudicata.* It has held that the Swift case, involving a contractual status arising from Swift's election to use the public stock yards, makes this case, involving *no* such contractual status, *res adjudicata.* The only possible *conclusion is that because the carriers' practices as to livestock directed into the public stock yards by Swift,*

were reasonable, Armour is to be barred from collecting its overcharges on livestock which need not have gone near the public stock yards.

This odd conclusion is the only one that can be drawn from the language of the Circuit Court:

> "Since our decision the Interstate Commerce Commission has adjudicated the administrative problems against Armour." (R. 91, 92.)
>
> "* * * the adverse administrative adjudication stands in Armour's way." (R. 92.)

How the Commission's decision of the reasonableness of a practice (Section 1) could be "against Armour," claiming (so the Circuit Court says) *only* "overcharge" (Section 6), (R. 82) is not made clear. Even had Armour followed Swift's practice and billed its traffic to the public stock yards, it does not follow that simultaneously, Swift might not have attacked the reasonableness of the carriers' practices under Section 1 of the Act before the *Commission*, and Armour proceeded in *court* to recover a tariff overcharge in violation of Section 6.

We have understood the law to be that a tariff overcharge, such as the Court finds is involved here, is forbidden by law. (Sec. 6(7), Title 49, U. S. C. A.) It is recoverable, as a matter of law, regardless of its reasonableness under Section 1. We are aware of no decision of this Court or of any other court, holding that the recovery thereof may be barred, by a finding that the tariff overcharge paid was "not unreasonable."

The only possible conclusion to be reached from the decision of the Circuit Court is, that a carrier may defend a suit for overcharge in excess of tariff rates on the ground that the excess charges exacted were not unreasonable; and that a violation of Section 6 (overcharge) need not be refunded unless the same charge *also* violates Section 1, by being unreasonable. Such a ruling emasculates the provisions of Section 6 entirely, and materially effects the jurisdiction of the courts over such questions.

Conclusion.

It is respectfully submitted that this Court should exercise its supervisory powers for the following reasons:

1. The conflict between the decision of this Court in the case of *Atchison, T. & S. F. Ry.* v. *U. S.*; 295 U. S. 193, (as interpreted by the Interstate Commerce Commission) on the one hand; and its decision in *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Adams* v. *Mills*, 286 U. S. 397; and *Union Stock Yards & T. Co.* v. *U. S.*, ... U. S. .....; 84 L. ed. 188) on the other hand; should be removed, and the question of whether or not a delivery of livestock at a public stock yards, imposes any different duties upon a common carrier than a delivery at a point other than a public stock yard, definitely settled.

A corollary question arises, which we believe should also be decided. Is the duty of a carrier, with reference to livestock delivered at a public stock yard any different, when the carrier selects that point of delivery, than when the consignee or shipper directs delivery at that point?

2. The principle announced by this Court in *Kansas* v. *Colorado*, 185 U. S. 125; and by the Circuit Court of Appeals for the Eighth Circuit in *Leimer* v. *State Mutual Life Assurance Co.*, 108 Fed. (2d) 302, should be applied, and the complaint interpreted thereunder. The opinion of the Circuit Court should be corrected to reflect the facts alleged in the complaint, and the jurisdiction under those facts should be considered, rather than the jurisdiction under facts gleaned from prior decisions of this Court involving *different* facts, and *different* contractual situations between the parties.

3. The conclusions of the Circuit Court should be correspondingly corrected, by being drawn from the facts actually presented by the complaint, so that those conclusions will be in harmony with the decisions of this Court, of the Federal Circuit and District Courts, of the State Courts, and of the Interstate Commerce Commission, in its interpretation and

application of Section 9; 12(1); 13(1); 15(1); 16(1); and 22 of the Act to Regulate Commerce (Title 49, U. S. C. A.).

Most respectfully submitted,

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Chicago, Illinois, August 1st, 1940.

APPENDIX A.

Statutes Involved in This Proceeding.

(Applicable portions are emphasized by the author.)

1. Federal Statutes establishing the jurisdiction of this Court.

Sec. 347 (a), Title 28, U. S. C. A.:

"(Judicial Code, section 240, amended.) Certiorari to circuit courts of appeal and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Sec. 350, Title 28, U. S. C. A.:

"Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari. No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made *within three months after the entry of such judgment* or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.

"Where an application for a writ of certiorari is

made with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia before the court wherein the same is pending has given a judgment or decree the application may be made at any time prior to the hearing and submission in that court.

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree *may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court.* The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer all damages and costs which the other party may sustain by reason of the stay."

2. Federal Statutes establishing jurisdiction of the courts and of the Commission over controversies between shippers and carriers in interstate commerce.

(1) Statutes defining jurisdiction of the Interstate Commerce Commission:

Sec. 12(1), Title 49, U. S. C. A.:

"(1) Authority, duties, and proceedings of commission; witnesses.

"The commission created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is authorized and required *to execute and enforce the provisions of this chapter;* and, upon the request of

the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the *enforcement of the provisions of this chapter* and for the punishment *of all violations thereof,* and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and *for the purposes of this chapter* the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

Sec. 13(1), Title 49, U. S. C. A.:

"Complaints to and investigations by commission.—(1) Complaint to commission of violation of law by carrier; reparation; investigation. Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything *done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof,* may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Sec. 15(1), Title 49, U. S. C. A.:

"(1) Commission empowered to determine and prescribe rates, classifications, etc. Whenever, after full hearing, upon a complaint made *as provided in section 13 of this chapter,* or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the *commission shall be of opinion that any* individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property or for the transmission of messages as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, *or otherwise in violation of any of the provisions of this chapter,* the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Sec. 16(1), Title 49, U. S. C. A.:

"(1) Orders by commission for payment of damages. If, after hearing on a complaint *made as provided in section 13 of this chapter,* the commission

shall determine that any party complainant is entitled to an award of damages under *the provisions of this chapter for a violation thereof,* the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

(2) Statutes establishing concurrent jurisdiction of certain controversies in the Commerce Commission and in the Federal Courts.

Sec. 9, Title 49, U. S. C. A.:

"Remedies of persons damaged; election; witnesses. Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable *under the provisions of this chapter,* in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

(3) Statutes reserving jurisdiction in the Courts.

Sec. 22, Title 49, U. S. C. A.

"* * * nothing in this chapter contained shall in any way *abridge or alter the remedies now existing at common law or by statute,* but the provisions of this chapter are in addition to such remedies; * * *."

3. Federal Statutes prohibiting the collection of charges in excess of tariff rates, by common carriers.

Sec. 6(7), Title 49, U. S. C. A.:

"(7) Transportation without filing and publishing rates forbidden; rebates; privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive *a greater or less or different compensation* for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

4. State Statute permitting joinder of Defendants and of causes of action.

Sec. 148, Chapter 110, Smith-Hurd's Ill. Stat. Annotated:

"(Civil Practice Act, Sec. 24.) Joinder of defendants—Suing in alternative.

"(1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction *or series of transactions* out of which the same arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally or in the alternative *arising out of the same transaction or series of transactions,* regardless of the number of causes of action joined.

"(2) It shall not be necessary that each defendant shall be interested *as to all the relief prayed for, or as to every cause of action included in any proceeding against him;* but the court may make such order as may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

APPENDIX B.

Citation of cases, decided between 1904 and the present, wherein the Interstate Commerce Commission has refused to take jurisdiction of actions for damages *not* arising out of violations of the Act to regulate commerce:

In Re Transportation and Refrigeration of Fruits, 10 I. C. C. 360, at 373:

> "But this duty does not spring from the Act to regulate commerce, *nor has this Commission any jurisdiction of that matter.* It arises out of the *common-law liability* of the defendant railway companies as common carriers, and *redress for failure to fulfill it must be sought in the courts.*"

Blume v. *Wells Fargo Exp. Co.,* 15 I. C. C. 53. at 54:

> *"It was not intended by the Congress that the Commission should supplant and take the place of the courts with respect to that large class of complaints that may arise out of the failure of carriers to carry out their contracts of transportation promptly and safely, and properly to perform their duties as common carriers in the handling of shipments entrusted to them for carriage from one point to another.* As to all such claims, as we have had occasion frequently to say in connection with informal complaints of this character, the Commission is without authority to afford redress."
>
> * * * * *
>
> "Breaches of duty in that respect, such as the loss of or damage to property in transit, *the failure to make delivery safely* and with reasonable despatch *in accordance with the contract,* express or implied, which a carrier enters into when accepting a shipment for carriage, are matters that are *solely within the jurisdiction of the courts.* The complaint here, is of such a character. The damages alleged to have been sustained by the complainants did *not* arise out of the breach of any duty or obligation resting upon the de-

fendant *under the terms of the Act to Regulate Commerce*, but out of the breach of a duty imposed upon it by the common law promptly *to deliver* at a designated point a shipment which it had accepted and agreed to deliver at that point. The *only recourse that shippers have with respect to such claims for damages is in the courts.*"

Larkin v. *Erie & W. Transp. Co.*, 24 I. C. C. 645 at 646.

Criswell v. *W. F. & N. W. Ry.*, 37 I. C. C. 97 at 98.

Lost or Damaged Freight Replacement, 43 I. C. C. 257 at 258.

Brunswick-Balke-Collender Co. v. *Toledo, S. & M. Ry.*, 44 I. C. C. 598 at 601.

H. L. Buss Company v. *New York Cent. R. R. Co.*, 45 I. C. C. 161.

Skilton v. *Director General*, 56 I. C. C. 251 at 252.

National Industrial Traffic League v. *Aberdeen & R. R. Co.*, 61 I. C. C. 120 at 125.

Western Stock Yards Co. v. *New York Cent. Ry. Co.*, 87 I. C. C. 4 at 8.

W. A. Patterson Company v. *Pere Marquette Railway Co. et al.*, 87 I. C. C. 357 at 358.

Toberman, Mackey & Co. v. *Director General, as Agent*, 89 I. C. C. 365 at 366.

Rosser and Fitch v. *Atlantic Coast Line R. R. Co.*, 91 I. C. C. 611.

Briggs & Turivas v. *Director General*, 112 I. C. C. 313 at 315.

Samuel Rinelli v. *New York, New Haven & Hartford R. R. Co.*, 112 I. C. C. 567 at 568.

Johnston v. *Charleston & West Carolina R. Co.*, 118 I. C. C. 19 at 20.

American Fuel Co. v. *Atchison, T. & S. F. Ry. Co.* 123 I. C. C. 101 at 112-113.

Scott-Graff Lumber Company v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. et al.*, 132 I. C. C. 745 at 746.

Wells & Son v. *Chicago, B. & Q. Ry.*, 161 I. C. C. 145 at 148-149.

Fuel Sales Corp. v. *Delaware, L. & W. R. Co.*, 225 I. C. C. 288 at 289:

> "Complainant does not definitely assail the tariff rule providing for the water allowance, but asserts several times of record that it is primarily interested in the loss and damage sustained. Defendant rightly objects to the Commission assuming jurisdiction if complainant is relying on loss in transit; as it is well settled that *our jurisdiction does not extend to loss and damage claims.*"